

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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LAURA LEE GAGNE,

Plaintiff-Appellee,

v

MARK DIBENEDETTO, JR.,

Defendant-Appellant.

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UNPUBLISHED

May 22, 2007

No. 268393

Manistee Circuit Court

LC No. 05-011916-NI

Before: Schuette, P.J., O’Connell and Davis, JJ.

PER CURIAM.

Defendants appeal by leave granted the order denying defendant’s motion for summary disposition brought under MCR 2.116(C)(8) and (10) in this permanent serious disfigurement and serious impairment of body function case brought under the no-fault act, MCL 500.3101 *et seq.* We reverse and remand.

Plaintiff’s third-party benefits claim was brought after she and defendant were involved in an automobile accident where she sustained a facial laceration. A piece of glass was removed from plaintiff’s face at the emergency room, and the wound was then cleaned and sutured by a plastic surgeon. Plaintiff sustained a complex scar on part of her right cheek and extending to her right lower eyelid; although not a straight line, it is approximately six centimeters long. Plaintiff also experienced some swelling in her eye following the accident, some eye dryness and occasional blurriness that allegedly arose as a result of the accident, and involuntary twitching in the injured area below her eye. Apparently, the swelling subsided, and the dryness is treatable with over-the-counter eye drops, but she continues to experience twitching. Plaintiff later underwent an additional procedure to reduce the obviousness of the scar, which had been causing her some amount of name-calling and teasing at her place of employment. According to plaintiff’s plastic surgeon, the scar is expected to continue healing to the point of being “noticeable but not in a significant way,” but it will not be medically improvable beyond that.

Defendant argues that the trial court improperly concluded that a factual question existed concerning whether plaintiff’s facial scarring constituted a permanent serious impairment. We agree.

A trial court’s decision on a motion for summary disposition is reviewed *de novo*, *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003), as is a question of statutory interpretation, *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 525-526; 697 NW2d

895 (2005). Under MCR 2.116(C)(10), the courts review all evidence submitted by the parties, and summary disposition should be granted to the moving party only where the evidence and all legitimate inferences, when viewed in the light most favorable to the nonmoving party, fails to establish a genuine issue regarding any material fact. *Coblentz v City of Novi*, 475 Mich 558, 567-568; 719 NW2d 73 (2006). A genuine issue of material fact exists when, giving the benefit of reasonable doubt to the opposing party, the record leaves open an issue on which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature, and the Legislature is presumed to have intended the meaning it plainly expressed. *Linsell v Applied Handling, Inc*, 266 Mich App 1, 15; 697 NW2d 913 (2005). If statutory language is clear and unambiguous, then a court is required to apply the statute as written. *Id.* A court may consult a dictionary for definitions to undefined statutory terms. *Griffith, supra* at 526.

For a claim of third-party damages filed on or after July 26, 1996, MCL 500.3135(2)(a) directs a court, not a jury, to determine whether a plaintiff has met either the permanent serious disfigurement or serious impairment of body function threshold unless there is an outcome-determinative factual dispute concerning the nature or extent of the person's injuries. MCL 500.3135(2)(a), accord *Kreiner v Fischer*, 471 Mich 109, 131-132; 683 NW2d 611 (2004), and *Kern v Blethen-Coluni*, 240 Mich App 333, 344; 612 NW2d 838 (2000). The trial court's decision rested on a conclusion that, under *Byer v Smith*, 419 Mich 541; 357 NW2d 644 (1984), the threshold was met if the disfigurement was permanent and it *had been* serious at any time. We disagree: the statute requires a "permanent serious disfigurement." MCL 500.3135(1). By not using a comma, it is plain that the Legislature intended for "permanent" to modify "serious." "Permanent" means "existing perpetually; everlasting." *Random House Webster's College Dictionary* (1997). Accordingly, the disfigurement must be perpetually serious. In that regard, if a threshold injury can be improved, whether through a post-accident procedure or by the body's natural ability to heal, to the extent that it no longer constitutes a threshold injury, third-party benefits are not available. See *Kosack v Moore*, 144 Mich App 485, 491; 375 NW2d 742 (1985).

As aptly noted by the trial court, when a scar is involved, conceivably, a person could initially have a threshold injury after an accident but no longer meet that threshold following a post-accident procedure. However, the legislative purpose of limiting noneconomic damages to those injured parties that meet a certain threshold, *Kosack, supra* at 489, would not be furthered by measuring whether a threshold injury has occurred at any time following an accident but should rather be determined by focusing on the injury when it has reached its optimal level of healing, whether naturally or procedurally. Therefore, the focus should be on the level of injury at the time that it is determined that the injury has maximally improved. If an individual was injured and the maximum healing period were to continue several years after litigation, a potential factual dispute concerning the maximum level of healing would involve a question to be decided by the jury under MCL 500.3135(2)(a), assuming that the extent of the injury was outcome determinative. Additionally, if a situation arose where an injured individual refused medical treatment for an injury that met the threshold but might have dropped below the threshold following medical treatment, this too would involve a question for the jury to decide, again assuming that the extent of the injury was outcome determinative. See *Kosack, supra* at 491.

However, neither situation presents itself here: plaintiff availed herself of all possible medical treatment, and the scar has apparently reached, or has nearly reached, its maximum level of healing by now. Therefore, whether the scar constitutes a permanent serious disfigurement depends on the scar's physical characteristics rather than its effect on a plaintiff's ability to lead a normal life. *Nelson v Myers*, 146 Mich App 444, 446; 381 NW2d 407 (1985), citing *Kosack, supra* at 491. In the absence of "a genuine outcome-determinative factual dispute," whether a disfigurement is a "'permanent serious disfigurement'" is a question of law for the court. *Kern, supra* at 344. When determining whether a scar is serious, the question should be answered by resorting to common knowledge and experience. *Nelson, supra* at 446 n 2. For purposes of determining whether the scar is serious, a court must objectively consider a plaintiff's subjective embarrassment and sensitivity about his or her appearance. *Id.* at 446. A scar that is hardly discernible does not meet the statutory threshold. *Petaja v Guck*, 178 Mich App 577, 580; 444 NW2d 209 (1989). This Court has determined that a one-inch scar on an eyelid and a three-centimeter scar under the eye did not constitute a threshold injury. *Kanaziz v Rounds*, 153 Mich App 180, 186-187; 395 NW2d 278 (1986); *Nelson, supra* at 446 n 1.

Here, we perceive no dispute that the scar is "permanent." Given that the scar has nearly reached its maximum amount of healing, there is no genuine factual dispute regarding the nature of the scar. Its severity is therefore a question of law for the court to determine. Unfortunately, the trial court did not make a determination of the scar's seriousness at the present time, and we are reluctant to rely solely on the photographs that we have been given on appeal. It is a matter of common knowledge and experience that people do not always look the same in a static, two-dimensional photograph as they do in real life, particularly where the face is concerned. We therefore conclude that we do not have enough evidence to engage in a complete review of the seriousness of the scar. The trial court erred in denying summary disposition to defendant on the ground that the scar *had been* serious at one point, so that denial must be reversed. But because we cannot conclude with certainty that the scar *is not now* serious, we remand for the trial court to make that determination.

It is unclear from the complaint whether plaintiff also asserted a claim based on a serious impairment of body function, but we look beyond the labels to determine the true gravamen of the claims alleged in the pleadings. *Klein v Kik*, 264 Mich App 682, 686; 692 NW2d 854 (2005). In any event, the parties stipulated below that the third-party benefits claim was based on the alleged eye condition. "'[S]erious impairment of body function' means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7). If a court can decide the issue as a matter of law, the next step is to determine whether an "'important body function'" has been impaired. *Kreiner, supra* at 132. If a court finds that an important body function is impaired and that the impairment is objectively manifested, then the court must determine whether "the impairment affects the plaintiff's general ability to lead his or her normal life." *Id.* at 132. The impairment must affect a person's ability to lead his or her normal life, which starts by comparing the plaintiff's life pre- and post-accident and then identifying how the person's life has been affected, by how much, and for how long. *Id.* at 132-133.

Presuming plaintiff's complaints about her eye are objectively manifested,<sup>1</sup> they amount to swelling that has subsided, occasional dryness that is amenable to relief in the form of over-the-counter eye drops, and some twitching and tingling. It does not appear to us that any of these complaints impede "plaintiff's 'general ability' to lead [her] life." *Kreiner, supra* at 133. "A negative effect on a particular aspect of an injured person's life is not sufficient in itself to meet the tort threshold, as long as the injured person is still generally able to lead [her] normal life." *Id.* at 137. Although presumably uncomfortable, plaintiff's lifestyle has apparently not been affected, nor has her general ability to lead her life. Plaintiff's alleged eye condition therefore does not constitute a serious impairment of body function.

Reversed and remanded for a determination of the seriousness of the scar as of the time it is maximally healed. We do not retain jurisdiction.

/s/ Bill Schuette  
/s/ Peter D. O'Connell  
/s/ Alton T. Davis

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<sup>1</sup> Subjective complaints that are not medically documented are insufficient. *Kreiner v Fischer*, 471 Mich 109, 131-132; 683 NW2d 611 (2004).